

# THE INTERIM

MAY 2004

HELENA, MONTANA

VOL. XIV NO. 12

## ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee Requests USB Bill Draft...The Energy and Telecommunications Interim Committee met March 25 in Helena. The committee directed staff to include the following provisions in its draft bill (LC 4) to revise the laws governing universal system benefits (USB) funds collected from electricity customers:

- extend the charge until Dec. 31, 2007. The charge is set to expire in 2005 without legislation;
- limit eligibility for renewable projects to cost-effective renewable projects;
- increase the percentage of USB funds that must be spent for low-income assistance programs from 17% to 24%; and
- require uniform, detailed reporting of USB expenditures.

On the Road Again, Committee Plans June Meeting in Colstrip...The Energy and Telecommunications Interim Committee will meet in Colstrip on June 9-10. Major topics that are planned for the agenda include:

- proposed projects to use Montana's coal resources to produce electricity;
- coal bed natural gas;
- measures to insulate utilities from the impact of riskier activities undertaken by holding companies or nonregulated affiliates;
- changes in state law that would be needed to clearly authorize the default supplier of electricity to include electrical generation facilities owned by the

default supplier in the rate base and to earn a rate of return on the default supply of electricity;

- revision of the laws related to the Energy and Telecommunications Interim Committee and energy policy development;
- legislation proposed or under consideration by the Public Service Commission; and
- a draft bill to revise the laws governing universal system benefits funds collected from electricity customers.

Want to Know More?...More details about the June and March meetings and millions of bytes of valuable information may be viewed on the committee's website. To get to the website, type "<http://leg.mt.gov>," click on "Committees," then click on "Interim." Scroll down to view the March meeting materials. Contact Mary Vandenberg at (406) 444-5367 or [mvandenberg@mt.gov](mailto:mvandenberg@mt.gov) for more information or to be added to a mailing list.

## LEGISLATIVE AUDIT COMMITTEE

The Legislative Audit Committee met March 23 in Helena. Legislative Audit Division staff presented the following audit reports:

### Financial Audit

Montana Water Pollution Control and Drinking Water State Revolving Fund Programs, Department of Environmental Quality, Department of Natural Resources and Conservation 03SP-85...LAD staff performed a financial audit of the Montana Water Pollution Control and Drinking Water State Revolving Fund Programs for the fiscal year ended June 30, 2003. The audit report contains the audited financial statements and accompanying notes for fiscal year 2003. LAD issued an unqualified opinion on the financial statements. The opinion means the reader may rely on the financial statements presented on the statewide accounting system.

### Financial-Compliance Audits

Department of Commerce 03-16...This audit report is the result of a financial-compliance audit of the Department of Commerce for the two fiscal years ended June 30, 2003. LAD issued an unqualified opinion on the financial schedules contained in this report. This means the reader may rely on the financial information and the supporting data presented on the statewide accounting system.

The previous audit report contained six recommendations, three of which are still applicable to the department. The department partially implemented the three

applicable recommendations. These recommendations are discussed again on page 10 of the audit report.

This audit report contains four recommendations concerning the department's recording of financial activity. Two of the recommendations relate to the Research & Commercialization Program and the Internal Service Funds working capital requirements. The report also addresses controls over the HOME and Moderate-Rehabilitation programs.

Montana State Library Commission 03-22...LAD performed a financial-compliance audit of the Montana State Library Commission. The audit report contains no recommendations related to the commission and contains an unqualified opinion on the financial schedules of the commission.

Montana Arts Council 03-23...This audit report is the result of a financial-compliance audit of the Montana Arts Council for the two fiscal years ended June 30, 2003. The recommendation in this report is related to noncompliance with section 2-18-703(2), MCA, concerning health insurance coverage for part-time employees.

LAD issued an unqualified opinion on the financial schedules contained in this report. The reader may rely on the financial information presented in the financial schedules and the supporting data presented on the statewide accounting system.

Department of Livestock 03-21...This audit report documents the results of a financial-compliance audit of the Department of Livestock for the two fiscal years ended June 30, 2003.

The audit report contains one recommendation on how the department could improve accounting and enhance compliance with state policies and laws. LAD issued an unqualified opinion on the financial schedules contained in the report. This means the reader may rely on the financial information and the supporting data presented on the statewide accounting system.

Montana Federal Single Audit 03-02...This document was prepared in accordance with the federal Single Audit Act Amendments of 1996 and OMB Circular A-133. It contains the auditor's reports on Montana's Basic Financial Statements and Schedules of Expenditures of Federal Awards for the two fiscal years ended June 30, 2003, as well as Reports on Internal Controls and Compliance, the Schedule of Findings and Questioned Costs, the Corrective Action Plan, and the Summary Schedule of Prior Audit Findings.

Department of Agriculture 03-20...This audit report contains the results of a financial-compliance audit of the Department of Agriculture for the two fiscal years ended June 30, 2003. The audit report includes two recommendations to the department related to improving management controls and accounting misstatements.

LAD issued an adverse opinion on the department's financial schedules for each of the two fiscal years ended June 30, 2002 and 2003, which means the reader

should not rely on the financial statements and the supporting information presented on the statewide accounting system.

Board of Regents and Office of the Commissioner of Higher Education 03-19...LAD performed a financial-compliance audit of the Board of Regents and Office of the Commissioner of Higher Education (OCHE) for the two fiscal years ended June 30, 2003. The prior audit report contained three recommendations. OCHE implemented all three recommendations. The three recommendations in this audit report relate to complying with state laws.

LAD issued an unqualified opinion on the financial schedules contained in the report. This means the reader may rely on the financial schedules and the supporting information presented on the statewide accounting system.

Office of Public Instruction 04-18...LAD performed a financial-compliance audit of the Office of Public Instruction. This audit report contains no recommendations related to the Office of Public Instruction and contains an unqualified opinion on the Office's financial schedules, which means the reader can rely on the information presented on the statewide accounting system.

### Performance Audit Survey

Determination of Public Assistance Eligibility, Public Assistance Bureau, Human and Community Services Division, Department of Public Health and Human Services 04P-07...This survey provides background information on the department's determination of eligibility for public assistance. The benefits of conducting further performance audit work of the process are limited. The initial audit indicates controls are in place and working. Additional audit work is not required.

Next Meeting Scheduled for June...The Legislative Audit Committee is scheduled to meet June 22 in Room 137 of the state Capitol.

## EDUCATION AND LOCAL GOVERNMENT COMMITTEE

Local Government Subcommittee Works on Subdivision Review...The Latin phrase *ad hoc* literally means "for this" and it is commonly used to characterize a committee or group that is formed for a particular purpose. After the Local Government Subcommittee met in January to work on its assigned study of the Subdivision and Platting Act (HJR 37) and to consider suggestions for improving subdivision review, an ad hoc working group formed for the purpose of crafting a draft bill to propose to the subcommittee that those involved could support.

The working group has been true to its name. Members who represent widely varied interests have been working diligently during the last several months to arrive at concepts and processes on which they or the organizations they represent can agree, all in the interest of improving subdivision review in Montana. Members represent the

Montana Association of Realtors, the Montana Smart Growth Coalition, the Montana Building Industry Association, the Montana Association of Planners, the Joint Powers Insurance Authority (affiliated with the Montana Association of Counties), the Montana Environmental Information Center, and, for purposes of discussions involving sanitation, the Department of Environmental Quality. At its April 2 meeting, the subcommittee heard an update of the ad hoc working group's progress.

The subcommittee was provided with a draft bill that incorporates changes to Title 76, chapter 3 and chapter 4 of the Montana Code Annotated (otherwise known as the Subdivision and Platting Act and the Sanitation in Subdivisions Act, respectively). Working group participants who addressed the subcommittee stressed that the draft bill is a "work in progress" but that many of the ideas still under discussion are close to resolution. All were optimistic that a draft implementing agreed-upon changes to the Subdivision and Platting Act would be ready in time for review by the subcommittee in early June. Sanitation is another story.

The subcommittee and the working group are wrestling with the fallout from a 2001 Attorney General Opinion (49 Op. Att'y Gen. No. 7) that held:

- Absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation in Subdivisions Act.
- Mont. Code Ann. § 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum requirements.
- Review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage.

In the absence of legislative action, the Attorney General Opinion has the force of law. Come January, legislative action can be expected. Lengthy subcommittee and working group discussions have centered around the appropriate amount and nature of sanitation information that should be available at the preliminary plat stage of a proposed subdivision. Some believe that, since water and other sanitation matters are based on science, they belong strictly within the realm of the scientists at the Department of Environmental Quality, not before the planning board or a board of county commissioners. Others maintain that those are absolutely the appropriate venues for such information and that the public has a right to comment on sanitation information in the presence of a planning board or board of county commissioners. There may be an opportunity for a compromise that would be approved by the subcommittee and, ultimately, endorsed by the Education and Local Government Committee. Or there may be competing legislation introduced for consideration by the 2005 Legislature.

To view the HJR 37 progress report and summary of the draft bill provided to the subcommittee on April 2, visit the Education and Local Government Committee's website at [http://leg.mt.gov/css/committees/interim/2003\\_2004/edu\\_local\\_gov/default.asp](http://leg.mt.gov/css/committees/interim/2003_2004/edu_local_gov/default.asp) and follow the links to the Local Government Subcommittee.

Subcommittee to Meet June 9...The subcommittee will meet on June 9. For more information about the subcommittee or the HJR 37 study, contact Leanne Kurtz, subcommittee staff, at [lekurtz@mt.gov](mailto:lekurtz@mt.gov) or (406) 444-3064.

## STATE ADMINISTRATION AND VETERANS' AFFAIRS COMMITTEE

Subcommittee Considers Funding Options for Highway Patrol...At the Jan. 23 State Administration and Veterans' Affairs Interim Committee meeting, Col. Shawn Driscoll, then chief of the Montana Highway Patrol, discussed the challenges in recruiting and retaining qualified candidates for MHP officer positions (see the Feb. 2004 issue of **THE INTERIM** for prior coverage). He said that one of the major problems is the pay differentials between MHP officers and local law enforcement officers in various Montana counties. Following Col. Driscoll's presentation, a subcommittee (Subcommittee on MHP Recruitment and Retention) was appointed to study the reasons for the ongoing challenges in recruiting and retaining qualified MHP officers.

The subcommittee met on April 13. Col. Randy Yaeger and other staff of the Montana Department of Justice, of which the MHP is a division, presented a detailed analysis of the problems and a detailed plan of action for consideration by the subcommittee. The plan of action included a recommendation to the Legislature to adequately fund in a predictable and sustainable manner the authorized level of MHP uniformed officers and to pay MHP uniformed officers on the basis of an index reflecting the pay levels of police officers and sheriff's officers in Montana's seven or eight most populous counties and the cities and towns within those counties.

Andrew Geiger, a performance auditor with the Legislative Audit Division, told the subcommittee that LAD is conducting a performance audit of the highway patrol. He discussed the preliminary findings and conclusions of the audit, most of which verified data and information provided by the MHP. Geiger said that the final results of the performance audit will be presented to the Legislative Audit Committee in June and will be made available to the subcommittee at that time.

After discussing the causes and implications of the recruiting and retention challenges facing the MHP, the subcommittee focused on potential solutions. The subcommittee decided that five options should be presented to the full committee at its next meeting, scheduled for June 10-11. In order of priority, the options are:

- Appropriate approximately \$532,000 annually to the MHP, funding that has been unavailable because of "vacancy savings" imposed on the MHP. With

this funding, the MHP should be able to maintain its approved force of approximately 220 uniformed officers.

- Impose a \$5 annual fee on each automobile liability insurance policy sold in Montana. Revenue from the fee would be earmarked for the MHP to mitigate problems of recruitment and retention of uniformed officers.
- As an alternative to a fee on each insurance policy, impose a \$5 annual fee on each vehicle registration or reregistration. Revenue from the fee would be earmarked for the MHP to mitigate problems of recruitment and retention of uniformed officers.
- Increase the beer tax from \$4.30 a barrel (on production in excess of 20,000 barrels annually) to a level sufficient to fund the staffing and compensation recommendations, but not to exceed the current federal tax rate on beer.
- If none of the new sources of revenue is adopted, appropriate state general fund money for the MHP to mitigate problems of recruitment and retention of uniformed officers.

Committee to Review State Agency Legislative Proposals in June...The full committee is scheduled to meet June 10-11 in Helena. The primary purpose of the meeting is to review state agency legislative proposals for the 2005 session. The committee is responsible for reviewing proposals from the Department of Administration, the Department of Military Affairs, and the Office of the Secretary of State, including any entities that are attached to any of the agencies (e.g., the Board of Veterans' Affairs or the Public Employees Retirement Board). Other legislation likely to be proposed--including legislation relevant to any of the public employee retirement systems, pay and benefit systems, public employee work rules, etc.--that is within the purview of the committee or the state agencies listed above may also be reviewed. The committee will also consider the subcommittee's funding recommendations for the highway patrol.

For more information about the committee or the subcommittee, contact Dave Bohyer at (406) 444-3064 or by e-mail at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## **SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE**

The SJR 32 Subcommittee on Medical Liability Insurance met on March 25. After receiving additional testimony from insurers, medical providers, medical facilities, persons injured through malpractice, and others, the subcommittee held an executive work session.

The work session focused on the day's testimony from stakeholders regarding the members' rankings of the 50 options that the members have had under consideration since January and on several options identified independently and proposed by Rep. Roy Brown and Rep. Don Roberts. The discussion resulted in, among other things, directions to staff to convert several of the options into draft legislation for further consideration at the June 24 meeting. Included among the draft bills to be prepared are:

- LC 5000: a Montana version of Wisconsin's Health Care Liability and Injured Patients and Families Compensation Act. This act, if adopted, would create an "excess liability insurance plan" in which medical providers and facilities would participate and through which all claims of medical negligence or malpractice would be processed. An overview of the Wisconsin Act is on the subcommittee's website, under "Reports."
- LC5001: providing that for purposes of a medical malpractice claim, liability may not be imposed on a health care provider or health care facility for an act or omission by a person or entity claimed to have been an ostensible agent of the health care provider or health care facility at the time that the act or omission occurred.
- LC 5002: providing that an insurer against medical malpractice need not pay and may not be ordered by a court to pay any type of damages, including but not limited to medical expenses and lost wages, prior to a final settlement or a judgment when liability for the act or omission and liability for the damages are reasonably clear.
- LC 5003: providing that a third-party claimant may not bring an action for bad faith in connection with the handling of a medical malpractice insurance claim.
- LC 5004: providing that for purposes of a medical malpractice claim, a health care provider or health care facility is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider or health care facility at the time that the act or omission occurred.
- LC 5005: regulating the amount of damages that may be granted for medical malpractice that reduces a patient's chance of recovery.
- LC 5006: revising the medical malpractice legal panel act by: requiring a claimant before the panel to pay half of the costs of the panel; increasing the maximum time in which a claim must be heard; requiring a legal record be made and kept of the panel hearing; and providing that the record, documentary evidence that is submitted, and panel decision are admissible in an action subsequently filed in a court.

- LC 5007: making expressions of sympathy or benevolence to an injured person or an injured person's family inadmissible as evidence of an admission of liability in a civil action.
- LC 5008: providing for qualifications for medical malpractice expert witnesses.
- LC 5009: providing for a joint underwriting association, consisting of all medical malpractice insurers operating in the state, that would provide medical malpractice insurance.

The "LC" numbers attached to the drafts are informal tracking numbers for reference only. None of the draft bills has been "officially" or "formally" requested.

When any of the draft bills is in a sufficiently completed state of drafting, it will be distributed to subcommittee members and interested persons and also will be posted to the subcommittee's website.

Next Meeting in June...The subcommittee's next meeting is scheduled for Thursday, June 24 (a change from the originally scheduled date) at the state Capitol. The principal agenda item for the June meeting will be further action on the draft bills, which might include additional testimony, consideration of proposed amendments, or subcommittee action.

A summary of previous meetings is also available on the subcommittee's website, through the agendas and minutes of the meetings. Please check the website periodically for more details of the subcommittee's meetings, past and future. You may also contact the subcommittee's lead staff, Dave Bohyer, Legislative Services Division, at (406) 444-3064 or at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## LEGISLATIVE COUNCIL

Council Meets in June...The Legislative Council will meet Friday, June 25 in Room 317 of the state Capitol. Members are scheduled to hear reports on several topics including the activities of the SJR 32 Subcommittee on Medical Liability Insurance, recent court challenges to state statutes, and state revenue collections and expenditures. The council also will discuss budget proposals for the 2007 biennium and legislation for the 2005 session.

For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail to [lomenzies@mt.gov](mailto:lomenzies@mt.gov).

## CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee to Meet in June...The Children, Families, Health, and Human Services Interim Committee will hold a "Legislative Roundup" in June. The Department of Public Health and Human Services will present its legislative proposals for the 2005 session. Other interested parties are invited to present any health or human services legislative proposals at that time. The Committee will also set its legislative agenda. Tentative dates for the meeting are June 10 and 11. Please check the committee's website for the actual dates of the next meeting.

Committee meeting materials will be available on the website by early June. If you need more information or want to be on the interested persons list, contact Susan Byorth Fox at (406) 444-3597 or [sfox@mt.gov](mailto:sfox@mt.gov).

## JOINT SUBCOMMITTEE ON POSTSECONDARY EDUCATION POLICY AND BUDGET

Subcommittee Meets Jointly with Board of Regents...The subcommittee met in joint session with the Board of Regents on March 24 in Dillon to hear a progress report on the Economic Development Shared Leadership Plan. A leadership group, comprised of leaders from the legislative and executive branches as well as from business, education, and other organizations, has been appointed and will provide oversight and direction for the project. A project team, consisting of people designated by the leadership group, has also been formed and will conduct the actual policy research and develop recommendations or options for review by the leadership group. The project team has launched the initiative working groups and will meet as needed to guide the development of recommendations for the leadership group.

UM Athletics Investigation...Dr. Sheila Stearns, Commissioner of Higher Education, provided an update on the University of Montana-Missoula intercollegiate athletics deficit and on the 12-member panel investigating the causes of the deficit. The panel is expected to report its findings and recommendations to the Board of Regents in May.

Joint Resolution Supporting Economic Development Plan Drafted...The subcommittee endorsed a working draft of a joint resolution urging the Legislature to support the efforts of the Board of Regents and the Montana university system to strengthen the state's economy by implementing the policy recommendations identified in the Shared Leadership Plan. The resolution will be finalized when the subcommittee completes its work later in the interim. The resolution will be presented to the Education and Local Government Committee for its consideration and endorsement by Sept. 2004.

Next Meeting Scheduled for May 19... At the invitation of the regent members, the subcommittee will meet May 19 with the Board of Regents in Great Falls. The regents will meet the next day in Havre. For more information about the meeting, please contact Pam Joehler at [pjoehler@mt.gov](mailto:pjoehler@mt.gov) or (406) 444-5386. Meeting information is also posted on the subcommittee's website at <http://leg.mt.gov>. Just click on "Committees" and follow the links to the Education and Local Government Committee, Postsecondary Education Policy and Budget Subcommittee.

## ECONOMIC AFFAIRS COMMITTEE

Venture Investing, Economic Development...The Economic Affairs Interim Committee will focus on economic development the morning of May 5. Four groups of investors will discuss how to structure venture capital funds. The committee will also review legislative options for enhancing economic development in Montana. The meeting starts at 8 a.m. in Room 137 of the State Capitol.

First up among the venture investors is A. Bart Holaday, who represents Adams Street Partners, an investment firm hired by the Montana Board of Investments to invest state money in venture and other funds. Discussing various ways of structuring venture fund programs will be:

- Mike Arpey and Kelly Williams from Credit Suisse First Boston;
- Philip Thomas and Ryan Brennan (invited), from Advantage Capital Partners; and
- Robert Heard and Stephen Ringlee, consultants on Fund of Funds legislation, which is being used in Oklahoma and Utah, among other states.

An ad hoc working group will present options for economic development legislation. The options are discussed in a staff report on economic development, which includes a history of state economic development programs. The report is on the Economic Affairs Committee website under the May 5 meeting materials. Go to <http://leg.mt.gov> and follow the "Committees" links.

Diving into Workers' Comp...During the afternoon session, the committee will weigh its choices on how to respond to Montana Supreme Court decisions regarding occupational disease and workers' compensation. The committee will also consider options to deal with exemptions from the Workers' Compensation Act. Both tasks are part of the SJR 17 workers' comp simplification interim study assigned to the Economic Affairs Committee. The SB 304 Committee, which is studying, among other topics, whether to privatize the Montana State Fund, will provide an update of its activities. The SB 304 Committee decided against privatization of the State Fund at its March meeting.

Another agenda item includes a review of a Montana Supreme Court decision on the stacking of insurance policies. For more details of the meeting, check the committee website by going to <http://leg.mt.gov> and following the "Committees" links. You may also contact Pat Murdo, committee staff, at (406) 444-3594 or [pmurdo@mt.gov](mailto:pmurdo@mt.gov).

## ENVIRONMENTAL QUALITY COUNCIL

Energy Policy Subcommittee and Environmental Quality Council Meet in May...The Energy Policy Subcommittee will meet on Wednesday, May 12, and the Environmental Quality Council will meet on Thursday, May 13. Both meetings will be in Room 102 of the state Capitol. The Subcommittee on Agency Oversight has the day off.

A Bridge Over Troubled Water...The council will spend a significant amount of time discussing water policy, focusing primarily on Montana's water adjudication program. The council will review the legislative history of HB407(1999 session) including committee hearing minutes and correspondence between the legislature and the Water Court in an effort to understand past and current efforts to develop and implement an on motion policy to deal with water right claims. The council will consider a bill draft that would make the chief water judge an elected position rather than a position appointed by the chief justice of the Supreme Court.

Director Bud Clinch, Department of Natural Resources and Conservation, will discuss how DNRC sets priorities for its programs and where the adjudication of water rights falls within those priorities. A panel consisting of the Water Court, DNRC, and the Water Compact Commission will discuss alternatives to increase the efficiency and effectiveness of the water adjudication program.

The council will consider a variable beneficial use fee for water use in Montana. The council will look at various fee schedules and alternatives for funding the water rights adjudication program at a level that will allow the adjudication to be completed in 15 years rather than the projected 38 years.

The council will discuss the application of the DNRC water rights database for water adjudication. The database contains information on claimed rights subject to adjudication as well as all of the new appropriations. The council will hear about the construction and permitting of artificial ponds in Montana and how they may affect existing water rights.

Staff will present a draft report on the status of metal mine bonding legislation, policy, and implementation. The council will conduct a preliminary review of water quality problems at the Zortman and Landusky gold mines.

Energy Policy Subcommittee...The Energy Policy Subcommittee will meet on Wednesday, May 12 in Room 102 of the Capitol. The subcommittee will review the draft *Alternative Energy Report*. In addition, the subcommittee will hear a presentations on: the state bonding process as it relates to financing alternative energy projects; the

impacts of the North American Free Trade Agreement on state energy regulations; and ways to revise the renewable resource grant and loan program to include alternative energy projects.

Information Available Electronically...Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at [http://www.leg.mt.gov/css/lepo/2003\\_2004/default.asp](http://www.leg.mt.gov/css/lepo/2003_2004/default.asp). You may also obtain additional information by calling (406) 444-3742, or by sending an e-mail to [eqc@mt.gov](mailto:eqc@mt.gov).

## TIME AND TIDE

(Tempus fugit)

<u>Event</u>	<u>Days remaining</u>
Target date for completion of interim committee work (September 15, 2004)	138
General election (November 2, 2004)	186
59th Legislature convenes (January 3, 2005)	248

## THE BACK PAGE

### IT'S DEJA VU ALL OVER AGAIN: SCHOOL FUNDING LITIGATION REDUX

By Connie Erickson  
Legislative Research Analyst

#### A LITTLE HISTORY

No one in Montana will argue the need for a high-quality public educational system. Public education is the cornerstone of our society. It is where our children learn the values that we all cherish as Americans. It is where our future is nurtured. Even the more pragmatic among us recognize the connection between economic development and a good educational system. Public education has always been a function of the states and not the federal government (although one could argue this latter point in light of the recent enactment of "No Child Left Behind", but I digress). In Montana, we have always recognized the importance of local communities having a certain amount of control of their schools. Public education is the responsibility of both the state and the local community.

The importance of public education was embedded in the 1889 Montana Constitution in Article XI that stated:

(1) It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.

(2) It shall be the duty of the legislative assembly to provide by taxation, or otherwise, sufficient means, in connection with the amount received from the general school fund, to maintain a public, free common school in each organized district in the state, for at least three months in each year.

In 1972, Montana adopted a new constitution that states in Article X, section 1:

(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural heritage.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other

educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

Montana's Constitution goes on, in Article X, section 8, to vest the supervision and control of schools in each school district in a locally elected board of trustees.

Although the importance of public education has been part and parcel of our thinking since territorial days, a major question associated with public education has been how to pay for it.

In 1865, the First Territorial Legislature enacted Montana's first school law. The law established the Territorial School Fund from receipts of the sales of certain lands granted to Montana by the federal government, enacted a countywide 1-mill levy, and required all fines for license violations to be deposited in the county school fund.<sup>1</sup> This was Montana's first school funding formula.

Over the years, the county mill levy increased, a county tax for high schools was enacted, certain state taxes were earmarked, and biennial appropriations were made--all to support public schools. In 1935, the first school equalization legislation was enacted. The classroom unit became the method for distributing state equalization aid. The amount for each elementary classroom unit was \$500 a school year plus 12 cents a pupil a day. For junior high and high schools, the rate was \$600 a school year plus 15 cents a pupil a day.<sup>2</sup> This equalization aid provided only about 20% of the amount needed by school districts.<sup>3</sup> School districts, especially rural districts, had to rely heavily on district and county property taxes to support their schools. To compound these inequities, county levies were distributed to school districts on the basis of school district population, not on actual educational or financial needs.

By the mid-1940s, a decade of economic hardship, drought, and war had created a crisis in Montana public schools. A series of efforts, beginning in 1945, on the part of legislators, educators, parents, and other interested persons culminated in the passage of the Foundation Program Act of 1949 (Chapter 199, Laws of 1949). The principal provision of this new law was that all taxpayers would be taxed the same number of mills to support a minimum foundation program for each school district. The minimum

---

<sup>1</sup>C.R. Anderson, Know Your School, Public Education in Montana (Helena, Montana: State Publishing Company, 1972), p. 15.

<sup>2</sup>Andrea Merrill, "The Montana School Foundation Program and State Equalization Aid: A Legislative and Financial History, 1941-1991", a report to the Joint Interim Subcommittee on School Funding (Helena, Montana: Montana Legislative Council, April 1992), p. 3.

<sup>3</sup>Ibid., p. 2.

foundation program was defined as "the amount required to operate and maintain an adequate and efficient school".<sup>4</sup> If the mills were not sufficient to fund the minimum foundation program, the state would pay the balance. In addition, a school district could augment the minimum educational program through a restricted nonvoted permissive levy. Two years later, school districts were given the authority to extend district spending even further by means of an unlimited voted levy.

In 1985, a coalition of school districts and parents filed a lawsuit against the state, claiming that the Foundation Program violated the constitutional rights of students to equal protection of the law and to equal educational opportunity. In January 1988, District Court Judge Henry Loble ruled in favor of the plaintiffs. The Loble decision was upheld by the Montana Supreme Court in February of 1989. In its decision, the Supreme Court also decried the lack of a relationship between state funding and the mandated educational program as established by the state's minimum accreditation standards.<sup>5</sup> The court also focused on the lack of adequate state funding.<sup>6</sup> The Legislature responded to the decision in a special legislative session in the summer of 1989 with the passage of House Bill No. 28 (Chapter 11, Special Laws of June 1989) that increased the county equalization levies, enacted a statewide levy, dedicated specific sources of revenue to state equalization, and earmarked a percentage of the interest from the coal tax permanent trust funds and a percentage of the total coal severance taxes for school equalization. In addition, a guaranteed tax base program was enacted.

The new funding system devised in HB 28 did not last long, however, because in 1991, two more lawsuits were filed, challenging its constitutionality. When these two cases became before the First District Court in early 1993, the Montana Legislature was in session and eventually passed House Bill No. 667 (Chapter 633, Laws of 1993) that changed the school funding formula from the Foundation Program to the current BASE budgeting system for school district general funds. As a result, the pending lawsuits were ultimately dismissed. In late 1993, the Legislature met in special session and enacted House Bill No. 22 (Chapter 38, Special Laws of November 1993) that reduced state support for public schools by 4.5%.

### FAST FORWARD TO 2004

Two years ago, school districts and educational organizations from across Montana came together to form the Montana Quality Education Coalition (MQEC). Alarmed by what it saw as a continuing pattern of decreasing state support for public education, MQEC was determined to secure the funding necessary to provide all Montana children

---

<sup>4</sup>Chapter 199, Laws of 1949.

<sup>5</sup>Helena Elementary School District No. 1 v. State, 236 Mont. 44, 53, 54, 769 P.2d 684 (1989).

<sup>6</sup>*Id.*, at 55.



with a quality education. On September 3, 2002, MQEC filed a lawsuit in the First Judicial District, challenging the constitutionality of Montana's school funding system. The trial began on January 20, 2004, before District Court Judge Jeffery Sherlock.

The plaintiffs argued that the current funding system is structurally flawed. It is not based on the cost of a quality education, the BASE and maximum budget amounts are arbitrary, enrollment declines cause disproportionate adverse impacts, and the system is complicated and irrational. In addition, the state's share of funding has steadily declined since 1991. The state based its defense of the current funding system on Montana's relative spending in light of its fiscal capacity as compared to other states, Montana's ability to recruit and retain quality teachers, and the achievement levels of Montana students as measured by available standardized tests.<sup>7</sup> Testimony concluded on February 4, and closing arguments were made on April 1.

On April 15, 2004, Judge Sherlock issued his decision. In his Findings of Fact, Judge Sherlock noted a number of major problems with HB 667 that created the current school funding system:

- ▶ lack of a mechanism to address inflation;
- ▶ no study of teacher pay, the cost of meeting accreditation standards, the fixed costs of school districts, or the costs of special education;
- ▶ reliance upon information that was 2-years old;
- ▶ lack of any study to justify the disparity in ANB dollars for high school and elementary students; and
- ▶ allowable increases not tied to the costs of increased accreditation standards or content and performance standards.

He then summarized all of the evidence that supported the plaintiffs' contention that the state was not adequately funding its share of the cost of education, including:

- ▶ the growing number of school districts budgeting at or near their maximum authority;
- ▶ the increasing number of schools with accreditation problems;
- ▶ the difficulty in recruiting and retaining teachers because of decreasing salaries and benefits;
- ▶ the large number of programs that have been cut in recent years;
- ▶ the increasing difficulties in constructing new buildings or maintaining current buildings;
- ▶ the increasing competition for general fund dollars between regular and special education;

---

<sup>7</sup>Columbia Falls School District No. 6 v. State [2004 ML 813, P 187 (First Judicial District)].

- ▶ the declining share of the state's contribution to school districts' general fund budgets; and
- ▶ a funding formula that is not reasonably related to the costs of providing a basic system of quality schools.

Judge Sherlock also noted that Article X, section 1(2), of the Montana Constitution requires the state to recognize "the distinct and unique cultural heritage of the American Indians" and to include the preservation of their cultural integrity in the state's educational goals. In his Findings, the judge stated that the state has done nothing to implement this subsection.

In his Conclusions of Law, Judge Sherlock ruled that the current state funding system violates the Montana Constitution in that:

1. The state has failed to recognize the distinct and unique cultural heritage of American Indians and has shown no commitment in its educational goals to the preservation of their cultural integrity.
2. The current school funding system fails to provide adequate funding for Montana's public schools.
3. The state is not paying its share of the cost of the basic elementary and secondary system.

He further concluded that a school finance system must be based upon a determination of the needs and the costs of the public school system and upon educationally relevant factors. He affirmed the finding of the Supreme Court in the 1989 school funding lawsuit that the school accreditation standards do not fully define the constitutional rights of students and the constitutional responsibilities of the state for funding its public schools.

In his Suggested Remedies, Judge Sherlock stated that it was not appropriate for the court to tell the Legislature how to design a school finance system. However, he also stated that the funding system must be based on the costs of meeting the standards that govern Montana schools. The state's share must be an amount that is adequate to allow districts to meet these standards. Because the state's constitutional obligations apply not only to general funds but also to the overall costs of the school system, Judge Sherlock recommended a phase-in plan for implementing a new funding system.

Judge Sherlock stayed his decision, pending resolution of the matter before the Montana Supreme Court. He also delayed the effective date of the decision until October 1, 2005, unless otherwise ordered by the Supreme Court, in order to give the 2005 Legislature an opportunity to address the issues in the decision.

The reaction to the decision was swift. On its website, the Montana School Boards Association highlighted the decision with the sentence "Children Win in School Funding

Litigation". On the MQEC website, one of the plaintiffs was quoted as saying, "Today the children of Montana had a great day." However, the Montana Senate Majority Leader said that Judge Sherlock had effectively raised taxes on all Montanans by his decision.<sup>8</sup> A gubernatorial candidate called for the removal of Judge Sherlock from the bench for exceeding his authority and trying to legislate from the bench.<sup>9</sup>

#### WHERE DO WE GO FROM HERE?

Immediately following the issuing of the decision, Attorney General Mike McGrath stated that an appeal to the Montana Supreme Court was very likely. Governor Judy Martz, although disappointed with the decision, expects that the K-12 Public School Renewal Commission will have recommendations for the next Legislature. Over the next few months, MQEC is planning a series of informational meetings across the state to hear suggestions and recommendations from parents, educators, and community leaders on how to address the decision.

It is highly unlikely that the state will not appeal this decision. It is too important of an issue to let a District Court ruling stand. How will the Supreme Court rule? It would be nice to have a crystal ball or be blessed with ESP right now. In their absence, however, there are other indications that the Sherlock decision will be upheld, if not totally, at least in part. In 1989, the Supreme Court declared Montana's school funding system unconstitutional. In his decision, Judge Sherlock quoted extensively from that decision and affirmed many of the Supreme Court's findings. So, our history shows that the Supreme Court takes the constitutional provisions in Article X, section 1, very seriously.

Montana is not alone in this litigation ship. In the year 2003, 24 of the 50 states were involved in school finance litigation. The predominant issue was adequacy, which is a shift from the equity-based litigation of the 1970s. Adequacy-based litigation has forced states to develop a rationale for the amount of money spent on education. One of the more notable adequacy lawsuits occurred in Wyoming in 1995. The Wyoming decision is of interest because the Supreme Court not only declared the school finance system inadequate, but also went on to dictate the duties of the Legislature that were necessary to provide the opportunity to "prepare high school graduates to participate in the political system and to compete both intellectually and economically".<sup>10</sup> At the state level, school

---

<sup>8</sup>Allison Farrell, "Dems, GOP clash over school suit," *Helena Independent Record*, 16 April 2004.

<sup>9</sup>Bob Anez, "Candidate: Judge should be ousted for ruling", *Helena Independent Record*, 21 April 2004, p. 6A.

<sup>10</sup>"Education Finance Litigation: History, Issues, and Current Status" [article on-line] (Denver, CO.:National Conference of State Legislatures, accessed 23 April 2004); available from <http://www.ncsl.org/programs/educ/LitigationCon.htm>.

finance litigation has historically met with considerable success, whether arguing equity or adequacy. There is no particular reason to believe that Montana will buck this trend.

Will the Supreme Court uphold the Sherlock decision? Will the K-12 Public School Renewal Commission devise a school funding formula that addresses adequacy? Will there be a special session in the summer of 2005? Will some gubernatorial candidates rethink their "no new taxes" pledge? Will Montanans finally agree to a sales tax? Will legislators finally agree to "tap the Trust"? The answers to these and many other questions will depend upon what happens in the courtroom and in the voting booth next fall.



## INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,  
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

### MAY

May 5, Economic Affairs Committee, Room 137, 8 a.m.

May 12, EQC Energy Policy Subcommittee, Room 102, 8 a.m.

May 13, Environmental Quality Council, Room 102, 8 a.m.

May 19, Joint Subcommittee on Postsecondary Education Policy and Budget (with Board of Regents), College of Technology, Great Falls, Montana, 1 p.m.

May 27, K-12 Education Subcommittee, Room 137, 1 p.m.

### JUNE

June 9, Local Government Subcommittee on Subdivision Review

June 9, Education and Local Government Committee, Room 137

June 9-10, Energy and Telecommunications Committee, Colstrip, Montana

June 10-11, State Administration and Veterans' Affairs Committee, Room 137

June 10-11, Legislative Finance Committee, Room 152

June 10-11, Children, Families, Health, and Human Services Committee (tentative)

June 22, Legislative Audit Committee, Room 137

June 24, SJR 32 Subcommittee on Medical Liability Insurance, Room 137

June 25, Legislative Council, Room 317

